



**6450-01-P**

**DEPARTMENT OF ENERGY**

**10 CFR Part 719**

**48 CFR Parts 931, 952, and 970**

**RIN 1990-AA37**

**Contractor Legal Management Requirements; Acquisition Regulations**

**AGENCY:** Office of General Counsel, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy revises existing regulations covering contractor legal management requirements. Conforming amendments are also made to the Department of Energy Acquisition Regulation (DEAR). The regulations provide rules for handling of legal matters and associated costs by certain contractors whose contracts exceed \$100,000,000 as well as legal counsel retained directly by the Department for matters in which costs exceed \$100,000.

**DATES:** Effective date: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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#### **I. Background**

The Department's contracts that include cost reimbursable elements generally allow reimbursement of legal costs, including the costs of litigation, if the costs are reasonable and incurred in accordance with the applicable cost principles and contract clauses. Consequently, the Department has an ongoing obligation to monitor and control the legal costs that it reimburses.

The Department has a long history of overseeing aspects of its contractors' management of legal matters and associated costs. This practice was formalized in 1994 when the Department published an interim Acquisition Letter as an interim policy in the Federal Register on August 31, 1994 (59 FR 44981). The interim Acquisition Letter was finalized as a Policy Statement on April 3, 1996 (61 FR 14763). This Policy Statement was followed by a formal rulemaking that added part 719, Contractor Legal Management Requirements, to Title 10 of the Code of Federal Regulations with an effective date of April 23, 2001 (66 FR 4616, 66 FR 19717).

After a decade operating in accordance with the 2001 rulemaking, the Department determined that it should review, update and revise the rule. Therefore, it did so and issued the results in a Notice of Proposed Rulemaking (NPR) on December 28, 2011 (76 FR 81408). The NPR requested public comments no later than February 27, 2012. The public comment period was reopened on March 2, 2012 and extended until March 16, 2012 (77 FR 12754).

Today's final rule revises the current contractor legal management requirements found in part 719, in Title 10 of the Code of Federal Regulations. The revisions reflect lessons learned by the Department during the years since implementing part 719. The part establishes regulations to monitor and control legal costs and to provide guidance to aid contractors and the Department in making determinations regarding the reasonableness of outside counsel costs, including the costs associated with litigation. Today's amendments to part 719 and the associated portions of the Department of Energy Acquisition Regulation (DEAR) are designed to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight over the expenditure of taxpayer dollars.

Contracting Officers must include the changes of this Final Rule in solicitations issued on or after the effective date of this rule. Contracting Officers may, at their discretion, include the changes of this Final Rule in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

Contracting Officers must apply the changes of this Final Rule to affected contracts, prospectively, by including them in those contracts by bilateral modifications. The changes are to become effective on the date the modifications are executed. Contracting Officers are to attempt to execute modifications within 60 days of the publication in the Federal Register of this Final Rule. Affected contracts are all management and operating contracts and other contracts that currently contain DEAR 931.205-33 or otherwise reference the Department's litigation management procedures and cost guidelines. DEAR 931.205-33 requires litigation and other legal expenses be incurred per 10 CFR Part 719, Contractor Legal Management Requirements, as a condition of allowability.

Contracting Officers must also incorporate the changes of this Final Rule into affected contracts before: extending them, exercising options under them, or adding additional term to them per award term provisions.

## **II. Public Comments**

The Department of Energy received public comments from fifteen respondents concerning the NOPR. Commenters were divided in their reaction to the proposed rule. Many of the commenters expressed concerns about the enlarged scope of the regulations, while one commenter praised the Department's efforts to increase oversight of legal costs. The Department carefully considered each comment and made numerous changes to today's final rule based upon concerns raised by the responses to the NOPR.

A short summary of the comments received and the Department of Energy's responses are set forth below. Comments from multiple responses were combined where the comments addressed similar issues and presented similar concerns. The comments

are listed under the proposed part 719 subheading to which they pertain in order to ease readability.

**§ 719.2 What are the definitions of terms used in this part?**

Comment 1: One commenter suggested that the monetary threshold for establishing a legal matter as a significant matter should be raised from \$100,000 to \$250,000.

Response 1: The Department believes the current threshold has been workable and efficient. We are aware of no evidence to the contrary, much less any showing that the existing threshold has significantly burdened contractors or their counsel. Moreover, the Department's experience has shown that the existing level has protected the public fisc by enabling the Department to identify and eliminate duplicative and other unnecessary outside counsel expenses that we would not have been in a position to detect under the suggested higher threshold.

Comment 2: One commenter suggested that the definition of Department Counsel be revised to clarify the distinction between DOE and NNSA field offices.

Response 2: The Department believes that the proposed definition, identical in pertinent part to the definition included in the previous version of the rule, is sufficiently clear.

Comment 3: One commenter suggested revising the definition of litigation to make it clear that, for purposes of the rule, the term applies only if the proceeding relates to a contract between the contractor and the Department. The commenter also suggested that the definition recognize that contractors may become parties in litigation in relation to a Department contract in territorial, District of Columbia, tribal or foreign courts or administrative bodies.

Response 3: The Department amends the definition in section 719.2 to implement the commenter's suggestions.

Comment 4: One commenter suggested that proceedings before state or federal administrative bodies or arbitrators be removed from the definition of litigation. The commenter stated that the definition was too broad and that there would be added expense due to the "onerous requirements that apply to litigation."

Response 4: The Department declines to remove matters before states or federal administrative bodies or arbitrators from the definition of litigation. The Department has limited the requirements for matters in litigation by not requiring submission of an engagement letter or Staffing and Resource Plan unless the matter in litigation is expected to exceed specified monetary thresholds. An engagement letter must be submitted for a matter in litigation only if retained legal counsel is expected to provide \$25,000 or more in services. A Staffing and Resource Plan must be submitted only if it is anticipated that retained legal counsel costs will exceed \$100,000.

Comment 5: Multiple commenters expressed concern regarding the proposed rule's definition of legal matter. They stated that inclusion of an "aggregate of legal issues associated with a particular subject area" within the definition would result in overly broad application of certain requirements tied to significant matters.

Response 5: The Department agrees with these comments and removes the previous definition of legal matter from today's rule. Where used, the term legal matter should be understood to carry its common meaning.

Comment 6: Several commenters suggested that the Department should include only an objective methodology for defining significant matters.

Response 6: Although the Department believes that Departmental authority to determine when a matter is to be considered significant is necessary, today's final rule includes a requirement that the Department notify the contractor in writing of all matters considered significant unless they cross the monetary threshold contained in section 719.2.

Comment 7: Several commenters expressed concern regarding the proposed rule's definition of a significant matter that triggers the Staffing and Resource Plan requirements under section 719.15 when the matter is deemed significant by Department Counsel. These commenters criticized the subjective nature of this determination. One commenter noted that contractors may find it necessary to burden Department Counsel with requests for determinations on matters that are not clearly significant in order to manage the threat of unallowable costs.

Response 7: The Department believes that the ability to define a matter as significant is essential to Departmental monitoring and managing contractor legal costs, but understands the need to have a clear identification of what constitutes a significant matter. Today's rule revises the definition of significant matter to state that a matter is significant when it is a legal matter that involves significant issues as determined by Department Counsel and identified to a contractor in writing, and where the amount of any legal costs, over the life of the matter, is expected to exceed \$100,000. Therefore, the final rule deletes section 719.16(d) of the proposed rule which requires that a contractor consult with Department Counsel when it is unclear whether a matter is significant.

**§ 719.3 What contracts are covered by the part?**

Comment 8: One commenter suggested that the Department include language further explaining the threshold requirements for applicability of the part.

Response 8: Based on experience administering the previous version of the part, the Department believes that further elaboration of the thresholds in section 719.3 is unnecessary.

Comment 9: One commenter stated that the interplay among sections 719.3, .4, and .5 is confusing and suggested that 719.4 and .5 be deleted.

Response 9: The Department declines to follow this suggestion. The Department believes that section 719.4(b) (which permits the Department to make the part applicable to a particular contract by inserting a specific contract clause requiring compliance) is necessary to ensure that the Department has the ability to make this part applicable to a contract that would otherwise be exempt. The Department believes that section 719.5 aids the public in understanding the applicability of the part.

**§ 719.4 Are law firms that are retained by contract by the Department covered by this part?**

Comment 10: One commenter suggested that section 719.4 be revised to specifically state which party is to determine whether costs are expected to exceed \$100,000.

Response 10: The Department agrees with the commenter and today's rule states that the Department will determine whether costs are expected to exceed \$100,000 and that the Department will provide notice of this determination to retained legal counsel.

**§ 719.6 Are there any types of legal matters not included in the coverage of this part?**



Comment 11: One commenter suggested that subcontractor bankruptcy matters be added to the list of legal matters to which the part does not apply in section 719.6.

Response 11: The Department declines to follow this suggestion because subcontractor bankruptcy actions are not so commonplace as to fall within the same category as routine intellectual property law support services and routine workers and unemployment compensation matters.

Comment 12: One commenter requested clarification as to whether routine workers compensation matters excluded from the purview of part 719 would be excluded if such matters are handled through a retrospective insurance policy.

Response 12: See the Department's responses to comments related to section 719.45 regarding retrospective insurance carriers.

Comment 13: Several commenters requested that the Department reverse its proposal to include labor arbitrations within the purview of part 719. Some commenters stated that treating labor arbitrations like other litigation for purposes of part 719 coverage will inappropriately insert the Department in the bargaining relationship between the contractor and the union.

Response 13: Labor arbitrations that are handled by in-house counsel for the contractor will not be subject to the majority of the requirements of part 719. In addition, labor arbitrations that are expected to result in less than \$25,000 in retained legal counsel costs do not require the contractor to execute an engagement letter.

As a matter of course, part 719 requirements will not apply to routine, low cost labor arbitrations; high cost arbitrations will be subject to the same litigation oversight requirements as other types of contractor litigation. In addition, departmental oversight

over expenditure of these legal costs in no way places the Department in the bargaining relationship between a contractor and a union. In labor arbitrations, as with other litigation, the contractor represents itself in the matter and the Department reimburses the contractor for reasonable, allowable, and allocable costs associated with the arbitration.

**§ 719.7 Is there a procedure for exceptions or deviations from this part?**

Comment 14: One commenter stated that the proposed rule fails to acknowledge legal management innovations adopted by the contractor community since part 719 was first published in 2001. The commenter proposed that part 719 be amended to include a provision allowing Department Management and Operating contractors to be exempted from the majority of part 719's approval requirements if the contractor demonstrates a management approach consistent with the best practices and contractor assurance principles identified in individual contracts and DOE Order 226.1B.

Response 14: The Department acknowledges advancements in the larger DOE contractor community's legal cost management practices. Section 719.7 provides Departmental flexibility to approve contractor request for exceptions or deviations from part 719. No changes to the part are necessary.

Comment 15: One commenter suggested that there should be a deemed approval of requests for exceptions or deviations filed per section 719.7, if the Department does not respond to the contractor's request within 30 days from receipt of the request. The commenter also suggested that when such requests are denied, the General Counsel and Senior Procurement Executive should be required to provide a written rationale for denial.

Response 15: The Department does not believe that deemed approval of requests for exceptions or deviations from the regulations is appropriate. However, the Department agrees that a written response to such requests is appropriate and amends today's rule to provide for such a response by the General Counsel or his or her delegee. The response requirement is not intended to require a justification for the Department's exercise of its discretion.

**§719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?**

Comment 16: Several commenters noted that the statement regarding application of privilege to documents exchanged between the Department and the contractors will apply only when the law of the relevant jurisdiction recognizes such a privilege.

Response 16: Section 719.8 includes the following limitation: “[t]o the extent documents associated with compliance with this part . . . are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications. . . .” This language recognizes that the common interest applies only when the underlying documents are protected by a privilege and when the relevant jurisdiction recognizes the common interest under the facts presented by DOE contractors.

Comment 17: One commenter noted that section 719.8's assertion that privilege is not waived by the sharing of documents with the Department is undermined when contractors are not able to rely on DOE approvals and authorizations to determine cost allowability.

Response 17: The proposed revisions to part 719 do not change the allowability analysis performed by Contracting Officers. Whether the Department's and contractor's interests are sufficiently aligned to support a finding of common interest for purposes of protecting items from disclosure is an analysis that will be performed by a court of competent jurisdiction as issues arise.

Comment 18: One commenter noted the statement in section 719.8 that the common interest is "rooted" in the reimbursement of allowable costs excludes other sources of the common interest, such as mission completion.

Response 18: To the extent that proposed section 719.8 implies that there is only one basis for the common interest between contractors and the Department, this misconception is clarified in the final rule. Today's final rule states that the common interest between the parties is primarily rooted in the Department's reimbursement of contractors for allowable costs incurred when litigation is threatened or initiated against contractors, but that other factors may also support a determination that the Department and the contractor share a common interest.

Comment 19: One commenter suggested that section 719.8 should address how the privilege would apply and who is authorized to waive the privilege.

Response 19: The parties authorized to waive the privilege and the operation of the privilege will be evaluated on a case-by-case basis. In some cases, a third party suing the contractor may assert that the privilege protecting certain documents from disclosure is waived because the documents were provided to an alleged outside party, the Department. Whether the privilege would operate in that circumstance depends on a host

of details surrounding the disclosure and the underlying documents. Therefore, in the view of the Department, no additional details need to be added to the regulation.

Comment 20: One commenter noted that the interests of the Department and a contractor may diverge at some point. For example, interests may diverge where an action could lead to government action against the contractor. The commenter suggested adding language to section 719.8 that would permit the contractor to withhold privileged information when it is reasonable to anticipate eventual divergence of interests.

Response 20: Contractors are not permitted by this part to withhold documents required to be submitted pursuant to this part because the contractor anticipates that the interest of the Department and the contractor in a litigation matter may diverge. Section 719.40 makes clear that adherence to part 719, including provision of documents such as Staffing and Resource Plans and settlement memoranda as appropriate, is a prerequisite to allowability. Failure to provide information required by part 719 may result in the denial of reimbursement of associated costs.

Comment 21: One commenter suggested that the Department require written common interest agreements before requesting privileged information from contractors.

Response 21: The Department declines to adopt this suggestion. Written common interest agreements may be helpful in some cases to emphasize that the parties' exchange of documents on a specific matter occurred in furtherance of their common interest, particularly if the matter is in litigation or if litigation is imminent. However, it is the view of the Department that it is not necessary to require the parties to enter into a common interest agreement every time that the parties exchange potentially sensitive documents or communications. Such a requirement would potentially disrupt site

operations by slowing the delivery of mission deliverables from the contractor to the government. Moreover, requiring the use of common interest agreements in all circumstances involving the sharing of potentially privileged information might undercut the ability of DOE and its contractors to protect the privilege when the parties did not enter into an agreement.

#### **§ 719.10 Who must submit a Legal Management Plan?**

Comment 22: One commenter questioned the continued wisdom of requiring contractor submission of a Legal Management Plan stating that it has been the commenter's experience that the plan is not often referenced by the Department. The commenter notes that frequent interaction between Department counsel and in-house counsel for the contractor obviates the need for a written Legal Management Plan.

Response 22: The Legal Management Plan documents critical information allowing the Department to guide practices and manage costs. The Department notes further that Legal Management Plans are commonplace among businesses. The Legal Management Plan assists Department Counsel in understanding the contractor's internal procedures, litigation protocols and processes to manage costs. Legal Management Plans are submitted following the award of a contract and revised only upon request of the Contracting Officer. The Department believes that the benefit of requiring submission of the plans outweighs any burden associated with compliance with this requirement.

#### **§ 719.11 When must a Legal Management Plan be submitted or revised?**

Comment 23: Several commenters suggested that the Department should be required to have a reason or justification for requesting a revised Legal Management Plan and should provide such reason or justification to the contractor with such a request.

Response 23: The Department agrees in part and today's final rule states that a request for a revised plan shall include an explanation for the request. However, the explanation requirement is not intended to require a justification for the Department's exercise of its discretion.

Comment 24: One commenter suggested that language be inserted at the end of section 719.11(b) allowing the Department to grant an extension of the deadline for submitting a revised Legal Management Plan. The commenter also suggested that the section state that all reasonable requests for extensions will not be denied.

Response 24: The Department agrees that that Department Counsel should have the authority to extend the deadline for submitting a revised Legal Management Plan and today's rule reflects this change. The Department declines to include the suggested statement concerning the acceptance of reasonable requests. The Department believes that Department Counsel must maintain the discretion to accept or reject a request for deadline extension to ensure proper management of contractor legal costs.

Comment 25: One commenter suggested that section 719.11(b), requiring contractors to submit a revised Legal Management Plan upon request of the contracting officer, should be deleted because it is unnecessary and burdensome.

Response 25: The Department declines to accept the suggestion. The ability to request a revised plan is necessary to ensure proper management of contractor legal costs.

#### **§ 719.12 What information must be included in the Legal Management Plan?**

Comment 26: Several commenters stated that the requirement in section 719.12(a) that the Legal Management Plan include a description of in-house counsel resources does not provide any benefit to the government and should be eliminated. Some of these

commenters questioned whether Department Counsel would be making determinations on whether in-house counsel would be qualified to handle a particular matter, thereby assuming the role of managing in-house counsel. Multiple commenters stated that the fact that a contractor has in-house counsel with experience in a specific area should not be determinative of whether engaging outside counsel is appropriate. Multiple commenters stated that as a contractor's in-house staff change, their levels of expertise will change and the Legal Management Plan will be quickly out of date.

Response 26: The Department believes that requiring a contractor to provide a description of in-house counsel resources is essential to developing an understanding of the contractor's internal legal resources. Although not determinative on its own, having information concerning the areas of expertise among a contractor's in-house resources is essential when evaluating the reasonableness of outside counsel use. Neither the submission of such information nor the existence of contractor in-house expertise precludes reimbursement of contractor outside counsel costs in appropriate situations. The Department believes that the information required to be included in a Legal Management Plan required by section 719.12(a) is necessary to ensure proper management of contractor legal costs. However, the Department appreciates the commenters' concerns regarding the required listing of "levels of experience of each legal staff member." Today's rule eliminates this requirement from the section.

Comment 27: One commenter recommended deletion of subsection (d), which requires an outline of the factors that the contractor will use in selecting outside counsel.



Response 27: The Department believes that the information requested under subsection (d) causes minimal burden and benefits the Department by providing the rationale for the selection of outside counsel. No change is made to today's final rule.

Comment 28: Several commenters suggested that section 719.12(k)'s requirement that the Legal Management Plan include a description of procedures for providing the earliest possible notification to the Department of the likely initiation of any legal matter concerning certain topics which are of general importance to the Department, should be revised or eliminated. Several commenters noted that the language in section 719.21(k) creates unnecessary ambiguity. Specifically, one commenter stated that the term "likely initiation" did not specify the triggering initiator. The commenter noted that if a third party was "likely initiating" litigation it is unlikely that the contractor would be aware of it and if the contractor was "likely initiating" litigation it would be required to get Department approval under 719.30. Another commenter complained that the information requested was overly burdensome. One commenter suggested that this paragraph should include an expanded definition of "classified information" to ensure proper handling of such information.

Response 28: The Department agrees that removal of section 719.12(k) is appropriate. Other requirements ensure that the Department is timely notified of impending legal matters and therefore this subsection has been removed from the final rule. Also, requirements regarding the handing of classified information are fully addressed in statutory and regulatory provisions governing such information.

Comment 29: Several commenters suggested that section 719.12(l) be eliminated because other regulations and contract provisions prohibit a contractor from submitting unallowable costs for reimbursement, and therefore it adds no value.

Response 29: The Department agrees that section 719.12(l) is duplicative of other prohibitions regarding submission of unallowable costs for reimbursement. Today's rule removes this section.

**§ 719.13 Who at the Department receives and reviews the Legal Management Plan?**

Comment 30: One commenter stated that section 719.13 should make plain that the Legal Management Plan is to be routed through the Contracting Officer.

Response 30: The Department has carefully considered the assignment of Departmental responsibilities under part 719 and believes that Departmental Counsel receipt of the Legal Management Plan is appropriate. Departmental Counsel will appropriately coordinate their efforts with the cognizant Contracting Officer.

**§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?**

Comment 31: Multiple commenters objected to the proposed deletion of the subsection allowing contractors to file a letter or other communication with the General Counsel disputing a Departmental Legal Management Plan determination of inadequacy or noncompliance, noting that this process may avoid contract disputes.

Response 31: The Department amends the final rule to permit contractors to file a letter with the General Counsel disputing a deficiency determination.

**§ 719.15 What are the requirements for a Staffing and Resource Plan?**

Comment 32: One commenter noted that section 719.15(e) makes reference to the budget developed in paragraph (c) of the section, but that the particularized budget requirement for the matter in litigation is set forth in paragraph (d).

Response 32: The Department recognizes this error and today's final rule corrects the section.

Comment 33: Several commenters addressed the requirement that contractors submit Staffing and Resource Plans for significant matters. They noted that these plans must describe, among other things, the major phases likely to be involved in the handling of the matter. The commenters stated that requiring the plan for all significant matters is impractical because the definition of Significant Matter includes any legal matter where the amount of legal costs over the lifetime of the matter is expected to exceed \$100,000. Because legal matter is defined to include an aggregate of legal issues associated with a particular subject area, the commenters are concerned that Staffing and Resource Plans will be required for series of discrete, unrelated issues which do not lend themselves to the preparation of such a plan.

Response 33: The Department agrees that the application of the requirement to provide a Staffing and Resource Plan is most appropriate for matters in litigation. Therefore section 719.15(a) is changed so that it applies only to significant matters in litigation.

Comment 34: Several commenters suggested that section 719.5(e) be changed to require contractor counsel to notify the Department of potential costs in excess of the Staffing and Resource Plan estimates instead of prohibiting the incurrence of such costs and requiring DOE approval. Several commenters suggested that the requirement for

pre-approval of over-budget costs should be deleted because it is impractical in the context of litigation, and litigation may be compromised if the contractor is required to go back to the Department for approval before incurring additional expenses. Some commenters expressed concern that advance approval for over-budget costs will lead to highly inflated budget estimates.

Response 34: The Department agrees with some of the commenters that this requirement should be changed from one of advance approval to advance notice. Under today's final rule the contractor must notify Department Counsel before incurring retained legal costs in excess of the budget developed pursuant to paragraph (d).

**§ 719.16 When must the Staffing and Resource Plan be submitted?**

Comment 35: One commenter suggested that language be inserted in section 719.16(a) allowing the Department to grant an extension to the deadline for submitting a Staffing and Resource Plan. The commenter also suggested that the section include a requirement that no reasonable requests for extensions will be denied.

Response 35: The Department agrees that Department Counsel should have the authority to extend the deadline for submitting a revised Staffing and Resource Plan and today's rule reflects this fact. The Department declines to include the suggested statement concerning the acceptance of reasonable requests. The Department believes that Department Counsel must maintain the discretion to accept or reject a request for deadline extension to ensure proper management of contractor legal costs.

Comment 36: Multiple commenters suggested that the right to dispute Department Counsel's stated objections to a Staffing and Resource Plan to the General Counsel,

which was deleted in the proposed rule, be retained. The commenters noted that this process may avoid contract disputes.

Response 36: The Department amends the final rule to permit contractors to file a letter with the General Counsel disputing a stated objection.

Comment 37: One commenter stated that requiring a plan be submitted within 30 days after DOE determines that a matter is to be considered a Significant Matter is unrealistic, noting that a contractor may not even have hired outside counsel within the 30 day period. The commenter further objected to the period allotted for DOE review of the plan, noting that waiting 30 days for DOE approval is not realistic during ongoing litigation.

Response 37: The Department notes that a Staffing and Resource Plan is required to be filed within 30 days after the filing of an answer or a dispositive motion in lieu of an answer or within 30 days after a determination that associated costs are expected to exceed \$100,000. These triggers should allow adequate time to prepare the required plan. The Department further believes that any concerns regarding the timeframe for contractor submission of the plan are adequately addressed by the addition of the option for Department Counsel to extend the deadline. Regarding the 30 day deadline for Department Counsel to state objections to the plan, the Department notes that there is no approval requirement and the regulation does not prohibit the contractor from taking any action during the 30 day period during which Department Counsel may state objections to the plan.

**§ 719.17 Are there any budgetary requirements?**

Comment 38: One commenter expressed concern about the interplay between the definition of significant matters and the words “existing or anticipated significant matters” in the proposed rule. The commenter noticed that the use of the word anticipated was confusing and could create problems during implementation.

Response 38: The Department agrees that the language “existing or anticipated” is not helpful, and today’s final rule removes the words “existing” and “anticipated.”

Comment 39: One commenter objected to the provision in section 719.17(c) requiring the submission of a report comparing its budgeted and actual legal costs at the conclusion of the budget period. The commenter stated that the Department has access to the information that would be reflected in the report.

Response 39: The Department believes that the required report will benefit its efforts to monitor and manage contractor legal costs. The contractor is in the best position to create the required report given that not all information regarding costs incurred during a particular budget period may have been provided to the Department within 30 days of the end of the budget period. Today’s final rule retains this requirement.

#### **§ 719.20 When must an engagement letter be submitted to Department Counsel?**

Comment 40: Multiple commenters expressed concern with the requirement that contractors submit to Department Counsel the terms of proposed engagement letters between the contractor and proposed retained legal counsel when the proposed legal services are expected to meet or exceed \$25,000. The commenters noted that the previous version of the regulation required submission of executed, rather than proposed, engagement letters and characterized the proposed change as requiring that contractors obtain Department preapproval before executing an engagement letter. Several

commenters stated that preapproval of engagement letters would unnecessarily burden contractors and delay the hiring of outside counsel. The commenters noted that Department preapproval of engagement letters is unnecessary because section 719.21 prescribes in great detail the information to be included in the engagement letter.

Response 40: The Department has considered the comments and agrees that it need not review proposed engagement letters. Section 719.21 provides clear guidance on requirements for these letters and preapproval may unnecessarily delay engagement of outside counsel. Today's final rule is amended to require the submission of executed, rather than proposed, engagement letters when retained counsel is expected to provide \$25,000 or more in legal services for a particular matter.

Comment 41: One commenter urged the Department to raise the \$25,000 threshold in section 719.20 that triggers the contractor obligation to obtain an engagement letter from retained legal counsel. The commenter noted that \$25,000 is the amount included in this regulation in 2001, and that this figure is unreasonably low given the increase in litigation costs over the last years. Another commenter stated that it is unclear when initiation of the engagement letter process will be expected if contractor counsel engages outside counsel for ad hoc advisory services.

Response 41: It is the view of the Department that obtaining an engagement letter from retained legal counsel that sets forth basic agreements regarding billing, invoice and record retention is a good practice and it is not an onerous requirement; rather, it is standard practice for companies hiring outside counsel and often required by State legal ethics rules. Also, section 719.20 states that contractors must submit the engagement letter "when the proposed retained counsel is expected to provide \$25,000 or more in

legal services for a particular matter.” It is the view of the Department that contractor counsel should form a good faith judgment whether a given matter will involve \$25,000 or more of legal expenses.

**§ 719.21 What are the required elements of an engagement letter?**

Comment 42: Several commenters noted that section 719.21(b)(6) should be clarified to specifically state that the initial assessment of the legal matter, along with a commitment to provide updates as necessary, must be provided by retained legal counsel rather than contractor counsel.

Response 42: The items set forth in section 719.21(b) describe the obligations of retained legal counsel. However, to ensure clarity, the text of section 719.21(b)(6) is changed to specify that the initial assessment and updates are the responsibility of retained legal counsel.

Comment 43: One commenter objected to the fact that the engagement letter requirements at section 719.21(b)(4) require the contractor to obtain agreement from retained legal counsel to maintain all records for six years and three months after the final payment or after final case disposition, whichever is later. The commenter noted that the current regulations require the engagement letter to state retained legal counsel will maintain all records for three years and further noted that additional storage costs will be incurred because of the extended record maintenance period.

Response 43: The requirement that retained legal counsel's records for a particular case must be maintained for six years, three months, aligns with the Contract Disputes Act statute of limitations. There is no change to the proposed record retention period in today's final rule.



Comment 44: One commenter noted that the required engagement letter elements are overly prescriptive and should be eliminated.

Response 44: The Department disagrees; obtaining an engagement letter from retained legal counsel that sets forth basic agreements regarding billing, invoices, and record retention reflects best practices for any company obtaining legal services.

Comment 45: One commenter recommended that an addition be made to the engagement letter requirements in section 719.21, requiring retained legal counsel to affirm that (s)he has read section 719.8 regarding waiver of privilege, and that provision of records to the Government is in no way intended to constitute a waiver of any applicable privilege.

Response 45: Section 719.21(b)(2) contains a requirement that the engagement letter from retained legal counsel must include a statement acknowledging that provision of records to the Government is not a waiver of applicable legal privilege, protection or immunity with respect to disclosure of these records to third parties. No additional acknowledgement requirement is necessary.

Comment 46: Several commenters suggested changes to section 719.21(b)(11), which sets forth the requirement that all engagement letters contain a statement that retained legal counsel will provide a certification concerning costs submitted for reimbursement. Several commenters suggested that the portion of the certification described in section 719.21(b)(11) affirming that “the costs and charges set forth herein are necessary” should read instead “the costs and charges set forth herein are reasonable, appropriate and in conformance with 10 CFR 719 and the client engagement letter covering this invoice.” In addition, the commenters suggested that section 719.21(b)(11)

be changed from “[i]nvoices must be submitted in conformance with the model bill format . . .” to “[i]nvoices must be submitted in conformance with the substance of the model bill format . . . .”

Response 46: The Department agrees with the commenters in part. The certification language in section 719.21(b)(11) in today’s final rule reads “the costs and charges set forth herein are appropriate and related to the representation of the client” to reinforce that retained legal counsel will certify that all billed items were necessary to represent its client, the contractor. With respect to the suggestion that the certification specifically state that retained legal counsel affirms that charges set forth are in conformance with 10 CFR part 719, it is the contractor, not retained legal counsel, that must adhere to 10 CFR part 719. Section 719.21(a) reminds the DOE contracting community that the obligation to adhere to 10 CFR part 719 is placed on the contractors: “[t]he engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.” With respect to the comment that the invoices should be submitted in conformance with the substance of the model bill, the language of section 719.21(b)(11) in today’s final rule clarifies that retained legal counsel must submit all information included in the model bill format of Appendix A to 10 CFR part 719, but that the invoice need not mirror the model bill. The modified language reads: “[i]nvoices must contain all elements (e.g., date of service, description of service, name of attorney) set forth in the model bill format in Appendix A to this part.”

**§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?**

Comment 47: Several commenters objected to the proposed requirement in that contractors obtain prior authorization from Department Counsel if the contractor wishes to file a counterclaim in a matter in litigation. The commenters asserted that counterclaims are fundamentally different from initiating litigation insofar as counterclaims do not start a lawsuit; rather, they are asserted or waived when a contractor is sued. Several commenters objected to this new requirement on its face and urged that if it is not removed entirely the regulation should, at the very least, require Department Counsel to respond to the contractor's request within a finite period of time. The commenters expressed concern that a lack of a timely response by Department Counsel may result in a waiver of the contractor's right to file counterclaims.

Response 47: The Department recognizes that contractors may need to file counterclaims in a short time frame. Today's final rule removes the requirement that contractors obtain Department Counsel approval before filing counterclaims.

Comment 48: Several commenters noted that section 719.30 states that contractors must obtain prior written authorization from Department Counsel to initiate litigation and counterclaims but that 719.30(b) confuses matters by implying the contracting officer would communicate the Department's decision on whether the contractor may initiate or appeal adverse decisions.

Response 48: The Department agrees that proposed section 719.30(b) creates an internal inconsistency. Today's final rule deletes proposed section 719.30(b) because it confuses the identity of the individual responsible for communicating approval of initiation of litigation to the contractor.

Comment 49: One commenter suggested that section 719.30(a)(10) be modified to state that the Department must benefit from approved litigation and that benefits to the contractor should not be factored in when considering requests to approve litigation.

Response 49: The Department declines to modify today's final rule to incorporate the commenter's suggestion. The language of the proposed rule provides the Department with the information needed to use its discretion in determining whether to approve contractor initiation of litigation.

#### **§ 719.31 When must the contractor initiate litigation against third parties?**

Comment 50: One commenter noted that a contractor's counsel may be acting in violation of ethical responsibilities to the client if the attorney follows Departmental direction to engage in litigation that is not meritorious.

Response 50: We reject any suggestion that the Department would direct a contractor to initiate unmeritorious litigation to fulfill its contractual obligations. Resolution of hypothetical future disagreements concerning contractors' obligations in such circumstances is beyond the purview of these regulations. Any contractor concerns should be directed to Department Counsel.

Comment 51: Several commenters noted that the provision in section 719.31 requiring contractors to initiate litigation against third parties upon the request of the contracting officer should be deleted because it does not specifically confirm that reasonable costs arising from such litigation will be allowable.

Response 52: The Department believes that section 719.31 merely reserves to the government the right to direct the contractor to engage in litigation that it deems to be in the best interest of the Department. The allowability of litigation costs, including costs

associated with litigation that the Department directs the contractor to undertake, will be evaluated by the contracting officer for reasonableness in light of the circumstances in the same manner as other costs incurred under the contract. Therefore, no blanket statement regarding the allowability of these costs is appropriate. No change to section 719.31 is necessary.

Comment 52: One commenter noted that the Department should add a discussion to the rule describing the effect of initiating litigation on the contractor and the Department, and stating why initiation of litigation would prove beneficial to the Department.

Response 52: The Department declines to implement the commenter's suggestion. The circumstances under which contractor initiation of litigation may be beneficial to the government will vary, but would normally be rooted in the government's interest in prudent expenditure of public funds (e.g., requiring a cost reimbursement contractor to file a lawsuit against a subcontractor when a positive outcome in the lawsuit would result in cost recapture for the government). Section 719.31 preserves all options so that the government may assert its right, among others, to cost recovery vis-a-vis the contractors that it reimburses.

**§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?**

Comment 53: Several commenters noted that the Department should articulate why contractor litigation is subject to extra scrutiny in this regulation, suggesting instead that litigation should be treated like other contractor purchases that involve less government oversight.

Response 53: Contractor litigation costs can significantly affect the Department's financial resources. In addition, litigation against contractors often directly affects the reputation of the Department and, directly or indirectly, its legal position. In light of these facts, the Department believes it is appropriate to subject contractor litigation to scrutiny that is not applied to contractor purchases of other goods and services.

Comment 54: One commenter suggested that “DOE/NNSA-approved” should be stricken and instead “Department Counsel-approved” should be inserted in section 719.32(c)(1).

Response 54: The Department agrees to modify today’s final rule to state that Department representatives will collaborate with contractor in-house counsel or Department Counsel approved outside counsel. This change is consistent with 719.32(b), which contemplates that the contractor shall proceed with litigation as directed from time to time by Department Counsel.

Comment 55: Several commenters suggested changing “claim” in section 719.32(c), (c)(1), and (c)(2) to “legal proceeding” because the remainder of 719.32 regulates a “legal proceeding.”

Response 55: The Department agrees that the term “legal proceeding” used at the start of section 719.32 in (a) should be used throughout this subpart to ensure consistency.

**§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?**

Comment 56: A number of commenters asserted that the \$25,000 settlement agreement approval threshold is too low. Several commenters suggested that the

settlement approval authority threshold be increased to at least \$100,000. Several commenters also noted the lack of a finite deadline for the Department to respond to the contractor's request to settle a lawsuit. In addition, several commenters noted that 719.33's statement that Departmental approval to settle a case does not mean that the settlement amount or associated legal costs will be determined to be allowable is a departure from longstanding DOE practice.

Response 56: The Department believes that the \$25,000 settlement agreement approval threshold is appropriate and no change is necessary. As noted previously, lawsuits against DOE/NNSA contractors have the potential to significantly affect DOE/NNSA budgetary resources and often bring additional non-monetary sensitivities. The Department believes it is appropriate to review and authorize settlement of cases for \$25,000 or more. In addition, the vast majority of existing Legal Management Plans require Department Counsel approval of settlements for any monetary value and, therefore, section 719.33 does not represent a radical departure from existing practice. With respect to the request for a deadline for Department Counsel to reply to a request for authority to enter into a settlement agreement, the Department declines to include such a deadline. The Department understands the need for expeditious review of settlement requests and Department Counsel will endeavor to approve settlement requests as soon as is practicable upon receipt. With respect to the assertions that in the past, approval to settle was granted simultaneously with a determination on allowability, the Department acknowledges that in some instances, in the past, Contracting Officers made explicit allowability determinations at the same time that Department Counsel notified the contractor that it could settle a matter. Under today's final rule, contracting officers may

still, in their discretion, make simultaneous settlement approval and cost allowability determinations. However, it should be noted that existing part 719 Appendix 5.2(B) makes clear that in some cases the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In addition, 48 CFR (FAR) 31.201-3, clearly states that no presumption of reasonableness is attached to the incurrence of costs by a contractor. Therefore, the proposed statement in section 719.33 that the Departmental cost allowability determination is distinct from a determination regarding settlement approval reiterates a concept that has been reflected since part 719's initial publication and is a well-established cost reimbursement contracting principle. In addition, at the time the contractor seeks settlement authority from Department Counsel, the contractor is in a position of superior knowledge regarding the underlying facts that may factor into a determination of the reasonableness of the costs, which may be revealed subsequent to the grant of settlement authority by Department Counsel to the contractor.

**§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?**

Comment 57: Two commenters noted that plaintiffs' counsel with whom they are engaging in settlement discussions might not be willing to share the type of information required to be provided to the Department under section 719.34(g), such as the proposed amount to be provided to each plaintiff. The commenters noted that inability to furnish information to the DOE for this reason should not be considered a violation of the regulation.

Response 57: The Department recognizes that when a contractor is sued, plaintiff's counsel may not share with the contractor the monetary amount to be provided to each



plaintiff. However, the Department believes no change is necessary because the first sentence of section 719.34 states that the contractor must provide a list of items in its settlement authority request “that includes the following information, as applicable.” The Department believes that use of the term “as applicable” accounts for the circumstance when a plaintiff’s counsel simply will not reveal to the contractor how much each plaintiff will receive pursuant to the contemplated settlement agreement. Therefore, no change is required.

Comment 58: Two commenters noted that section 719.34’s requirement that the contractor submit several documents to Department Counsel to inform the decision as to whether settlement authority should be granted puts the attorney client/work product privilege at risk.

Response 58: The Department declines to make any change to section 719.34 based on this comment. As stated in section 719.8, it is the view of the Department that otherwise privileged documents provided to the Department pursuant to part 719 are protected from disclosure to third parties because the Department and the contractors share a common interest in the litigation.

Comment 59: One commenter noted that the requirement in section 719.34(f) for contractors to provide information about all of the terms of the settlement agreement, including non-monetary terms, is intrusive and, further, the contractors have the contractual authority to manage their workforces, including handling nonmonetary settlement terms. The commenter also stated that the general requirement in section 719.34 to provide a settlement memorandum is unnecessary.

Response 59: The Department believes that contractor provision of all of the terms associated with a settlement proposal assists the Department in fully understanding and evaluating the contractor's settlement request. This subpart does not limit the contractor's ability to manage its workforce. No change is necessary.

**§ 719.35 When must the contractor provide a copy of the executed settlement agreement?**

Comment 60: Several commenters noted that the requirement in section 719.35 to provide an executed copy of the settlement agreement should be eliminated because the agreement may be subject to disclosure pursuant to FOIA. The commenters also noted that the requirement to submit the settlement agreement within seven days of execution was unnecessary.

Response 60: The Department discloses all documents subject to the Freedom of Information Act to promote the goals of transparency and accountability in government. The release of settlement agreements in the possession of the Department, both draft and executed, will be governed by FOIA. The benefit of Department Counsel review of all relevant provisions of a settlement agreement (e.g., to assist in a determination of the reasonableness of the underlying costs) outweighs the burden associated with potential disclosure of settlement agreements pursuant to FOIA. It is the view of the Department that it is not unduly burdensome for contractors to transmit a settlement agreement within seven days of execution. Therefore, no change to the time period is necessary.

**§ 719.40 What effect do the regulations of this part have on cost allowability?**

Comment 61: Several commenters objected to the language in section 719.40, which states that compliance with part 719 is a prerequisite for the allowability of legal costs.

Some commenters asked whether the Department intends to establish a new standard for determining the allowability of legal costs.

Response 61: The purpose of the language in section 719.40 is to clarify language regarding cost allowability issues previously appearing at section 5.0 of the Appendix to the part, which was deleted in the proposed rule. Compliance with part 719 has always been one of several considerations in determining the allowability of legal costs and is not sufficient by itself to determine that costs are allowable. Another consideration is compliance with the other contract terms and conditions, including the standards for allowability articulated in FAR part 31 and DEAR part 931. Nevertheless, in order to ensure clarity, the following language is added to the last sentence of the section: “in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.”

Comment 62: One commenter recommended adding a “mechanism for the contractor to challenge determinations that could increase potentially unreimbursed liabilities under the Disputes Clause.”

Response 62: The Department believes that the Contract Disputes Act referenced in the Disputes Clause of DOE contracts provides the legal mechanism for contractors to challenge Department decisions regarding cost allowability.

#### **§ 719.41 How does the Department determine whether fees are reasonable?**

Comment 63: One commenter recommends amending paragraph (b) to read: “(b) whether lower rates from other firms providing comparable services at comparable competency and experience levels were available.” Another commenter recommended

deleting this section because it could be misconstrued and understood to mean that the contractor must always use the least expensive option.

Response 63: The Department believes that in routine and unspecialized cases it is often unnecessary to engage law firms that charge higher than ordinary fees even where such law firms may be considered to have more or better experience in similar matters. The Department expects contractors to engage law firms that provide competent legal services at a good value. Therefore, a modified version of the suggested language is added to today's final rule to make it clear that the government expects contractors to engage outside counsel who are appropriately competent and experienced and who offer competitive rates.

**§ 719.44 What categories of costs require advance approval?**

Comment 64: Several commenters requested that the Department clarify section 719.44 by stating that it only applies to costs incurred by retained legal counsel.

Response 64: The Department agrees that this section applies to certain costs incurred by retained counsel and not costs associated with in-house counsel. The Department has revised this section accordingly.

Comment 65: One commenter suggested that contractors' determinations regarding the reasonableness of outside counsel fee increases during the course of ongoing litigation action should be sufficient and recommended that requiring Department approval of such increases is unnecessary.

Response 65: Because litigation often lasts for long periods of time, the Department believes that it is important for it to approve fee increases in order to maintain effective cost control. The Department does not believe that obtaining Department approval for a

fee increase in the middle of an action is likely to be an impediment to the progress of the action because sufficient notice of a fee increase should be given by outside counsel before it becomes effective, thereby providing ample time for the contractor to obtain DOE approval.

Comment 66: One commenter recommended that section 719.44(a)(1) be deleted, or in the alternative, the use of e-discovery vendors, commercially available software, and web-based review and production databases should be excluded from its purview. The commenter stated that the use of software analytics is standard industry practice and therefore the provision has outlived its usefulness. The commenter also objected to the language stating that the Department be given “dominion over any computers or any general application software.” The commenter expressed a concern that e-discovery vendors would object to the term and that it may violate the terms of software licenses.

Response 66: The Department declines to accept the commenter’s proposals for section 719.44(a)(1). The regulation covers only computers, software, and databases purchased or created for specific matters. With respect to the commenter’s objection to the Department’s request for “dominion” over computers or software, this section does not involve access to all of the information on contractor counsel’s computers, only the information related to the particular matters covered by the rule.

Comment 67: One commenter suggests deleting the requirement for DOE approval for two or more attorneys to attend depositions, the use of law clerks, and the retention of expert witnesses. These approvals were described as unduly burdensome and not cost-effective because contractors can effectively manage such costs.

Response 67: The Department believes that it is appropriate to require approval for these types of costs in order to maintain effective cost control. No change is required.

Comment 68: One commenter suggests an increase of the \$5,000 threshold in subpart (a)(2) to \$25,000 to reflect increases in costs of materials and non-attorney services over the last decade.

Response 68: The Department has removed the requirement for preapproval of charges for materials or non-attorney services exceeding \$5,000.

Comment 69: One commenter suggested that any time the Department approves a fee increase for retained counsel, the approved increase should be deemed reasonable and allowable unless unallowable under some other applicable contract term or cost principle.

Response 69: Approval by the Department of a fee increase is one factor in determining the reasonableness of legal costs that include such a fee. However, when determining whether legal costs are allowable, factors other than the fee amount that must be considered and determined to be reasonable. The Department declines to modify today's final rule based upon the commenter's suggestion.

**§ 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?**

Comment 70: Some commenters objected to the already-existing monitoring requirements applicable to legal costs incurred by subcontractors whose contracts provide for the reimbursement of legal costs.

Response 70: Through these regulations, the Department seeks to achieve an appropriate balance of Department oversight, contractor oversight, and the flexibility to allow subcontractors to handle legal matters with an appropriate degree of discretion.

The general requirement for contractors to monitor legal costs incurred by their cost-reimbursement subcontractors is not new, and the Department considers it necessary to retain this requirement in order to ensure that all costs reimbursed to the contractor are reasonable and allowable, including pass-through costs incurred by lower-tier contractors and service providers.

Comment 71: Many commenters objected to the proposed requirements applicable to legal matters handled by retrospective insurance carriers. In the notice of proposed rulemaking, the Department proposed requirements applicable to all subcontractors as well as additional requirements applicable only to retrospective insurance carriers. The proposed rule would have required contractors to obtain from retrospective insurance carriers a Staffing and Resource Plan for all legal matters that are expected to reach or exceed \$100,000 in cost, and engagement letters when insurance carriers retain the services of outside counsel for \$25,000 or more. Contractors would also have needed to obtain approval from Department Counsel before authorizing retrospective insurance carriers to make settlements in amounts of \$25,000 or more.

Many commenters expressed concern that these requirements would conflict with the existing cost and litigation controls and protocols used by retrospective insurance carriers and would lead to increases in premiums or possibly result in insurance carriers being unwilling to provide DOE contractors with retrospective insurance policies. The commenters noted that DOE has had a long-standing policy of encouraging the use of retrospective insurance carriers as a way to gain cost-effective claims-handling expertise and that including these requirements would potentially undermine the Department's objectives with respect to the use of retrospective insurance carriers. Some commenters

also recommended that if DOE wishes to promulgate these additional requirements, DOE should directly negotiate with the insurance industry. Additionally, a number of commenters suggested that part 719's new retrospective insurance requirements conflict with the Department's policies on retrospective insurance articulated in DOE Order 350.1. Finally, one commenter objected to the section's characterization of retrospective insurance carriers as "subcontractors." The commenter questioned the implications of this characterization.

Most comments urged the elimination of these new provisions, but some suggested in the alternative that DOE limit the application of the new requirements by excluding workers compensation and general liability policies from part 719. The comments also requested clarification on whether or not routine workers compensation matters handled by retrospective insurance carriers were meant to be excluded from the new requirements.

Response 71: The Department has fully considered the comments and has determined that many of the observations have merit. The Department recognizes the claims-handling expertise of retrospective insurance carriers and agrees that the proposed requirements could result in unnecessary redundancies in the insurance carriers' existing litigation management procedures and potentially result in higher premiums. However, the Department does not agree that the section should be eliminated in its entirety or that the Department should directly contract for retrospective insurance services. The Department believes that it is necessary for both the contractor and the Department to monitor the progress of certain legal matters handled by subcontractors whose contracts provide for the reimbursement of legal costs. Therefore, in light of the Department's



objectives and the comments received, the Department has decided to modify the proposed rule as follows:

(1) The regulation includes a requirement that contractors employ a monitoring system for all significant matters handled by subcontractors other than retrospective insurance carriers whose legal costs will be reimbursed by the Department to ensure that both the contractor and the Department are regularly apprised of developments in the progress of significant matters.

(2) The regulation does not include a requirement that retrospective insurance carriers provide Staffing and Resource Plans or engagement letters.

(3) A requirement to provide the Department with cost information associated with legal matters handled by retrospective insurance carriers and other subcontractors upon request was added to facilitate determining cost allowability as necessary.

(4) Proposed section 719.46(g) discussing audits was deleted because it is redundant to the statement in section 719.46 regarding the Government right to audit costs.

(5) The requirement for contractors to provide the Department with cost and status updates for significant matters handled by subcontractors was retained in order to ensure that the Department is fully informed of the progress of significant matters and costs associated with such matters. However, this requirement no longer applies to significant matters handled by retrospective insurance carriers, except upon the written request by the Department.

(6) The regulation requires subcontractors, including retrospective insurance carriers, to obtain permission to enter into settlement agreements that exceed certain thresholds. The Department has determined that the appropriate settlement threshold for

retrospective insurance carriers is \$100,000, and the appropriate threshold for other subcontractors is \$25,000.

The settlement threshold of \$100,000 for retrospective insurance carriers is appropriate because it is recognized that insurance carriers bring certain claims-handling expertise. Additionally, settlements or payments by retrospective insurance carriers that are \$100,000 or more represent a very small portion of the total claims handled by retrospective insurance carriers under DOE contracts. Therefore, it is anticipated that the \$100,000 settlement approval requirement threshold will be triggered only occasionally.

The settlement approval threshold of \$25,000 for subcontractors is appropriate because it is consistent with the requirement applicable to DOE prime contractors and because other subcontractors do not have the same expertise in handling claims or other legal matters that retrospective insurance carriers have.

Finally, the Department notes that coverage exclusions set forth in section 719.6 are applicable to the requirements of section 719.45.

**§ 719.50 What authority does Department counsel have?**

Comment 72: Two commenters noted that Department Counsel should be authorized Contracting Officer's Representatives (COR).

Response 72: The Department notes that the rule, as drafted, contemplates Department Counsel serving as authorized CORs for contracts subject to the part.

**§ 719.51 What information must be forwarded to the General Counsel's office concerning contractor submissions to Department Counsel under this part?**

Comment 73: One commenter stated that the requirement in section 719.51 that Department Counsel forward certain information to the General Counsel's office is overly burdensome.

Response 73: The Department disagrees. Moreover, the requirement relates to internal Department procedures, not contractor obligations.

**§ 719.52 What types of field actions must be coordinated with the General Counsel?**

Comment 74: One commenter recommended deletion of section 719.52 to the extent that it requires General Counsel approval for any exception or deviation from the part.

Response 74: The Department declines to follow this suggestion and today's rule requires General Counsel approval of deviations or exceptions to the part to ensure a coordinated approach to contractor legal management across the DOE complex.

**Appendix A to Part 719 – Guidance for Legal Resource Management**

Comment 75: One commenter recommended deletion of the language concerning alternative dispute resolution. The commenter suggested prescriptive guidance on ADR has no value because each matter is case-specific.

Response 75: The new language merely encourages the contractor to consult with the Department's Office of Conflict Prevention and Resolution to evaluate whether a matter may be effectively and efficiently resolved by alternative dispute resolution. No change is necessary to the Appendix language.

Comment 76: One commenter objected to the limitation on copying charges to ten cents per page, because it has not been changed in the last 15 years.

Response 76: Today's rule eliminates the ten cents per page example from Note 2 to the Appendix and inserts "number of pages times cost per page" in its place.

## **Title 48 – Federal Acquisition Regulations System**

### **Part 970 – DOE Management and Operating Contracts**

Comment 77: One commenter inquired about the intended effect of deleting former subparagraph (i) of 48 CFR 970.5228-1. This paragraph stated that a contractor has the burden of proof to establish that costs are allowable and reasonable if, after an initial review of the facts, the Contracting Officer challenges a specific cost or informs the contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

Response 77: The Department determined that this subparagraph is duplicative and unnecessary as FAR 31.201-3, Determining reasonableness, provides that the contractor holds the burden of proof if a cost is challenged by the contracting officer or COR.

Comment 78: One commenter asked what the Department intended when revising the direction in 48 CFR 952.231-71 and 970.5228-1 previously at paragraph (j)(1) and in the proposed rule at (g)(1) regarding contractor handling of litigation costs. Specifically, the commenter asked what the Department means by requiring such costs to be "excluded" and whether the revised language expressed the presumption that litigation costs are unallowable.

Response 78: The Department appreciates the commenter's concern and understands that the revised language, when read in conjunction with FAR 31.201-6, Accounting for unallowable costs, may be read as indicating a presumption of unallowability. No such

presumption is intended and the Department revises today's final rule to delete the term “excluded” from 48 CFR 952.231-71 and 970.5228-1 paragraph (j)(1). Paragraphs (g)(1) of the two clauses now mirror the language included at 48 CFR 31.205-47. The paragraphs state in pertinent part: “All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately.”

**General Comments:**

Comment 79: One commenter expressed concerns regarding the varying requirements that the contractor seek approvals and provide submissions to Department Counsel, the Contracting Officer, or both. The commenter suggests that the Department require Contracting Officers to designate Department Counsel as the single point of contact for part 719 requirements.

Response 79: The Department acknowledges the varying requirements identified by the commenter and today’s final rule consistently identifies Department Counsel as the primary point of contractor contact for purposes of part 719.

Comment 80: One commenter suggested that Management and Operating contractors should not be subject to part 719 and instead should have a separate regulation for litigation expenses. The commenter noted the differences between Management and Operating contractors and other cost reimbursement contractors as significant and deserving of separate regulations.

Response 80: The Department does not believe that separate regulations for Management and Operations contractors and other cost reimbursement contractors are necessary or prudent. Part 719 provides an appropriate level of oversight for all contractors who are subject to its provisions.

Comment 81: One commenter suggested that the Department rescind part 719 and convert the substance of the part to a Department-issued manual. The commenter recommends that such a manual contain best management practices for legal management and that DOE issue the manual as a guide to be applied with skill and judgment of Department Counsel and contractor counsel through a graded approach depending on the experience level of contractor counsel. The commenter suggests that the proposed manual co-exist with a required Legal Management Plan developed and administered jointly by the contractor and the Department, compliance with which would be specifically required by a new contract clause. The commenter suggests that the Department should rely on 48 CFR 31.205-33 in determining cost allowability and consider allocating a portion of the contractor's fee to the "management effectiveness" section of the contractor's annual Performance Evaluation Management Plan, with fee deductions occurring for those contractors who do not manage their Legal Management Plan and/or litigation as provided in the Performance Evaluation Management Plan.

Response 81: The Department disagrees with the commenter's proposal that the regulation be rescinded and its substance converted to a manual of best practices. The Department believes that a uniform rule provides for consistency in oversight and control of contractor legal management and associated costs across the DOE complex. Of the possible approaches to contractor legal management, the Department believes that today's rule as amended in response to public comments strikes an appropriate balance and provides the best approach.

Comment 82: One commenter suggested that the regulations be applied only to contractor legal matters for which costs are expected to exceed \$100,000. The

commenter recommended that this will align treatment of contractor and Department retained counsel. Another commenter suggested that the Federal Acquisition Regulation Simplified Acquisition Threshold be used as a threshold under which legal matters could be handled with autonomy by the contractor.

Response 82: These recommendations would effectively raise all thresholds for requirements under the part to a minimum of \$100,000. As explained herein, the Department believes that lower thresholds for various requirements are necessary to facilitate control of legal costs. Additionally, the distinction between applicability of the part to contractor and Department-retained counsel is justified because the Department has direct control of its costs in these matters as the represented client.

Comment 83: One commenter suggested that the proposed rule would increase costs and improperly increases oversight and administrative burdens. This commenter recommended that DOE withdraw the proposed rule, restart the rulemaking process, and proceed with increased contractor engagement.

Response 83: The Department has engaged contractors regarding the subject of today's rule during the years spent administering the regulations that previously appeared at 10 CFR part 719. The Department has carefully considered the comments received in response to the Notice of Proposed Rulemaking and believes that today's rule appropriately balances the benefits and burdens related to contractor legal management requirements.

Comment 84: Multiple commenters expressed that the proposed rule is contrary to the Department's general governance reform efforts and that the part increases the level of control over contractor legal management. One commenter stated that the proposed

rule fails to acknowledge legal management innovations adopted by the contractor community since the part was first published in 2001 and is not properly innovative in its approach to the legal management landscape. Multiple commenters stated that the revisions to the part would increase burdens placed on the contractors and correspondingly increase costs. Multiple commenters stated that DOE and NNSA field counsel should have been more involved in the rulemaking process. Commenters also stated that the proposed rule goes beyond the recommendation of the 2009 Office of Inspector General Report regarding contractor litigation costs that was offered by the Department as one impetus for today's revision.

Response 84: The Department believes that today's rule provides for the correct amount of contractor and department-retained counsel oversight. The regulation reduces or eliminates several requirements contained in the previous version and adds only limited requirements necessary to ensure proper stewardship of taxpayer dollars. Certain requirements included in the regulation for the first time with today's rule (e.g., Department approval of contractor settlements in section 719.33) are simply codifications of contractual requirements. Additionally, the Department has carefully considered the comments received in response to the proposed rule and has deleted a number of proposed requirements. For example, the requirements in Subpart E regarding retrospective insurance carriers have been significantly reduced. Today's final rule is the result of significant efforts to balance the needs of the Department with those of its contractors. Although the 2009 Inspector General Report was one impetus for today's final rule, it was not the only reason for the revision. The Department believes that the



thorough review conducted by the Department and today's revisions to the rule will result in better management of retained legal counsel and contractor legal costs.

Comment 85: One commenter suggested broadly that the language regarding costs previously included in part 719 be restored. The commenter suggested that the primary purpose of the proposed revisions was to change the Department's approach to allowability of legal costs, but the Department failed to state this purpose.

Response 85: The Department disagrees with the commenter's characterization of the revisions to part 719. As discussed in the NOPR (76 FR 8148), the primary purposes of the revisions are to amend the requirements related to management of contractor legal costs to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight of the expenditure of taxpayer dollars.

Comment 86: One commenter suggested revising the statement of authority underlying the part to include additional statutory citations.

Response 86: The Department declines to revise the statement of authority for the part. The current statement is accurate and sufficient.

### **III. Summary of Final Rule**

Subpart A, sections 719.1-719.8, includes general provisions, defines important terms, and addresses applicability of the part. Section 719.2 defines terms used throughout the part. Today's final rule no longer includes a definition of legal matter because respondents noted that it caused confusion about the applicability of the part. The definitions of litigation, retrospective insurance, significant matters, and Staffing and Resource Plan were also modified in the final rule based on commenter concerns. The

definition of significant matter now includes language requiring the Department to notify a contractor in writing if the Department determines a matter is significant.

Section 719.3 continues to cover all outside legal costs incurred under the Department's Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding \$100,000,000, and non-Management and Operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000. Today's final rule retains the proposed expansion of applicability of the part; however, it now also references section 719.5 to make it clear that the part does not apply to contracts under which the Department does not reimburse legal costs even if they otherwise meet the criteria described in section 719.3. Sections 719.3 and 719.4 continue to apply this part to legal counsel retained directly by the Department where the legal costs over the life of the matter are expected to exceed \$100,000.

Sections 719.5 and 719.6 describe types of contracts and legal matters not covered by this part and no significant changes were made to the NOPR in today's final rule. Procedures for exceptions or deviations from the part are set out in section 719.7. Today's final rule provides that, where a deviation or exception is requested, the General Counsel will provide a written response. Section 719.8 states that the sharing of certain information between contractors and the Department does not waive any applicable privilege, and today's final rule adds more potential bases for the privilege.

Subpart B, sections 719.10-719.17, describes the requirements for submission of a Legal Management Plan, Staffing and Resource Plan, and annual legal budget. Sections 719.10 -719.14 concern the requirement for a Legal Management Plan. Today's final

rule clarifies that requests for revised Legal Management Plans shall include an explanation and that the deadline for revised Legal Management Plans may be extended. Today's final rule removes two requirements from the Legal Management Plan under proposed section 719.12. The contractor no longer needs to provide a description of procedures for providing notification of the likely initiation of a legal matter to the Department or a description of procedures the contractor uses to ensure unallowable costs are not submitted for reimbursement. Section 719.14, concerning the adequacy of Legal Management Plans, is modified in today's final rule to allow the contractor the option of filing a letter disputing the determination of a deficiency.

Sections 719.15-719.17 explain the requirements associated with the Staffing and Resource Plan and budgets. Changes were made to 719.15 to limit the Staffing and Resource Plan requirement to litigation matters and to eliminate the need for contractors to obtain prior approval before incurring legal costs in excess of the budget. The contractor must still notify the Department before exceeding budget costs.

Subpart C, sections 719.20-719.21, describes the requirements for engagement letters. Contractors must submit executed engagement letters to Department Counsel when legal services are expected to exceed \$25,000, as described in section 719.20. Section 719.21 describes the required elements of an engagement letter.

Subpart D, sections 719.30-719.35, describes the requirements related to contractor initiation of offensive or defensive litigation, including appeals, and for contractor settlement of legal matters. Current part 719 addresses initiation and defense of litigation in the Appendix to the part. Today's final rule deletes these portions of the Appendix and modifies and moves requirements regarding initiation and notification of litigation to

subpart D. The regulations also modify and move requirements related to initiation and notification of litigation from the DEAR Insurance—Litigation and Claims clauses, 48 CFR 952.231-71 and 48 CFR 970.5228-1, to part 719, subpart D, in order to clarify the requirements and streamline the regulations. In today's final rule, the Department, of its own accord, decides to no longer assume the authority to prevent the contractor from initiating or defending litigation, including appeals, but the Department requires notice before litigation is initiated and maintains the right to authorize offensive litigation for which the contractor seeks reimbursement.

Section 719.33 requires a contractor to obtain permission from Department Counsel to enter a settlement agreement requiring contractor payment of \$25,000 or more. Previously this requirement was included in contractor Legal Management Plans. Section 719.34 lists documentation that must be submitted with a contractor's request to settle a matter, and 719.35 provides contractors with a deadline for submitting executed settlement agreements to the Department.

Subpart E, sections 719.40-719.47, describes the policies and limitations for reimbursement of legal costs associated with retained legal counsel. Section 719.40 makes it clear that compliance with part 719 is a prerequisite for allowability of legal costs. Sections 719.42-719.44 describe categories of costs that are unallowable, require special treatment or need advance approval.

Section 719.45 describes special requirements related to subcontractors, including retrospective insurance carriers. These requirements are significantly modified from the Notice of Proposed Rulemaking. Retrospective insurance carriers must get prior approval from contractors if settlement payment is likely to reach \$100,000 or more and

subcontractors must get prior approval if settlement payment is likely to reach \$25,000 or more. The contractor must obtain Department approval before authorizing payments to claimants exceeding the settlement thresholds.

Subpart F, sections 719.50-719.52, discusses the roles and responsibilities of Department Counsel. Section 719.50 describes the limitations on Department Counsel authority. Sections 719.51 and 719.52 set forth parameters for Department Counsel coordination with Department of Energy and National Nuclear Security Administration Offices of General Counsel.

The Appendix to part 719 discusses expectations related to alternative dispute resolution. The Appendix also makes clear that there is no presumption of reasonableness attached to incurrence of costs by a contractor and notes that the reasons underlying incurrence of a legal cost may affect its allowability. The Attachment to part 719 includes a model bill format for contractor use.

The Department is also making corresponding changes to the DEAR. The clause prescription at 48 CFR 931.205–19 is revised to prescribe insertion of the clause at 48 CFR 952.231–71 in (1) non-Management and Operating cost reimbursement contracts exceeding \$100,000,000, and (2) non-Management and Operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000. The clause prescription at 48 CFR 970.2803–2 is revised to prescribe insertion of the clause at 48 CFR 970.5228–1 in all Management and Operating contracts. Both prescriptions are revised to clarify that the prescribed clauses are to be inserted instead of the clause at 48 CFR 52.228–7. The Insurance—litigation and claims clauses at 48 CFR 952.231–71 and 48 CFR 970.5228–1 are revised to reflect the above described consolidation of

requirements related to initiation and notification of litigation in subpart D of part 719. Other changes to the clauses are included to simplify and clarify their requirements. Paragraph (a) of both DEAR clauses requires compliance with 10 CFR part 719 “if applicable,” recognizing that the clause sometimes may be included in contracts which do not provide for the reimbursement of legal costs subject to 10 CFR part 719. The cost principle at 48 CFR 931.205–33 is revised to reflect the amended applicability of the DEAR Insurance—litigation and claims clauses and to clarify the requirement for contractor compliance with part 719 when the part is applicable to a particular contract.

#### **IV. Procedural Requirements**

##### **A. Review Under Executive Orders 12866 and 13563.**

This regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735, October 4, 1993. Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. DOE has also reviewed this rule pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to, and explicitly reaffirms, the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of

cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

#### **B. Review Under Executive Order 12988.**

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729, February 7, 1996, imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a

general standard; and (4) promote simplification and burden reduction. With regard to the review required by Section 3(a), Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or that it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, these regulations meet the relevant standards of Executive Order 12988.

### **C. Review Under the Regulatory Flexibility Act.**

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. DOE certified at the time of the proposed rule that this rulemaking would not have a significant economic impact on a substantial number of small entities. No comments were received regarding that certification. As a result, DOE



adopts as final that certification and, therefore, no regulatory flexibility analysis has been prepared.

#### **D. Review Under the Paperwork Reduction Act.**

The final rule requires each covered contractor to submit a Legal Management Plan that describes the contractor's practices for managing legal matters for which it procures the services of retained legal counsel. Under certain circumstances Staffing and Resource Plans, annual legal budgets, and engagement letters are required to be submitted to the Department. Documentation related to initiation of litigation and settlement of legal matters also may be required. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by Office of Management and Budget (OMB). OMB approved the information collection associated with this final rule under OMB Control Number 1910-5115.

#### **E. Review Under the National Environmental Policy Act.**

DOE has concluded that promulgation of this final rule falls into a class of actions that would not individually, or cumulatively, have significant impact on the human environment, as determined by DOE's regulations, 10 CFR part 1021, Subpart D, implementing the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 et seq. Specifically, this rule is categorically excluded from NEPA review because today's rule is strictly procedural (categorical exclusion A6). Therefore, this rule does not

require an environmental impact statement or environmental assessment pursuant to NEPA.

**F. Review Under Executive Order 13132.**

Executive Order 13132, 64 FR 43255, August 4, 1999, imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it would not preempt state law and would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

**G. Review Under the Unfunded Mandates Reform Act of 1995.**

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires a federal agency to perform a detailed assessment of costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of \$100 million or more in any single year. This rule does not impose a federal mandate on state, local or tribal governments or on the private sector.

**H. Review Under the Treasury and General Government Appropriations Act, 1999.**

Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, requires federal agencies to issue a Family Policymaking

Assessment for any rule or policy that may affect family well-being. This rule would have no impact on family well-being.

#### **I. Review Under Executive Order 13211.**

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355, May 22, 2001, requires federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### **J. Review Under the Treasury and General Government Appropriations Act, 2001.**

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516, note, provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines

issued by OMB. OMB's guidelines were published at 67 FR 8452, February 22, 2002, and DOE's guidelines were published at 67 FR 62446, October 7, 2002. DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

**K. Congressional Notification.**

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rule. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects**

**10 CFR Part 719**

Government contracts, Legal services, Reporting and recordkeeping requirements.

**48 CFR Parts 931, 952, and 970**

Government contracts, Government procurement.

Issued in Washington, DC on April 25, 2013.

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Daniel B. Poneman,  
Acting Secretary of Energy

For the reasons set out in the preamble, the Department of Energy (DOE) amends Chapter III of Title 10 and Chapter IX of Title 48 of the Code of Federal Regulations as set forth below:

## **TITLE 10—ENERGY**

### **Chapter III—Department of Energy**

1. Part 719 is revised to read as follows:

#### **PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS**

Sec.

##### **Subpart A—General Provisions**

- 719.1 What is the purpose of this part?
- 719.2 What are the definitions of terms used in this part?
- 719.3 What contracts are covered by this part?
- 719.4 Are law firms that are retained by contract by the Department covered by this part?
- 719.5 What contracts are not covered by this part?
- 719.6 Are there any types of legal matters not included in the coverage of this part?
- 719.7 Is there a procedure for exceptions or deviations from this part?
- 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?

##### **Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

- 719.10 Who must submit a Legal Management Plan?
- 719.11 When must a Legal Management Plan be submitted or revised?
- 719.12 What information must be included in the Legal Management Plan?
- 719.13 Who at the Department receives and reviews the Legal Management Plan?
- 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?
- 719.15 What are the requirements for a Staffing and Resource Plan?
- 719.16 When must the Staffing and Resource Plan be submitted?
- 719.17 Are there any budgetary requirements?

##### **Subpart C—Engagement Letter**

- 719.20 When must an engagement letter be submitted to Department Counsel?
- 719.21 What are the required elements of an engagement letter?

## **Subpart D—Requests from Contractor Counsel to Initiate, Defend, and Settle Legal Matters**

719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

719.31 When must the contractor initiate litigation against third parties?

719.32 What must the contractor do when it receives notice that it is a party to litigation?

719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?

719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?

719.35 When must the contractor provide a copy of an executed settlement agreement?

## **Subpart E—Reimbursement of Costs Subject to this Part**

719.40 What effect do the regulations of this part have on cost allowability?

719.41 How does the Department determine whether fees are reasonable?

719.42 What categories of costs are unallowable?

719.43 What is the treatment of travel costs?

719.44 What categories of costs require advance approval?

719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

719.46 Are costs covered by this part subject to audit?

719.47 What happens when more than one contractor is a party to a matter?

## **Subpart F—Department Counsel**

719.50 What authority does Department Counsel have?

719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?

719.52 What types of field actions must be coordinated with the General Counsel?

## **Appendix A to Part 719—Guidance for Legal Resource Management**

**Authority:** 42 U.S.C. 2201, 5814, 5815 and 7101, et seq.; 50 U.S.C. 2401, et seq.

## **Subpart A—General Provisions**

### **§ 719.1 What is the purpose of this part?**

This part facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs. It requires the contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside

counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the contractor to document the terms of the engagement with retained legal counsel. Payment of Department-retained law firm invoices and reimbursement of contractor legal costs under covered contracts are subject to compliance with this part.

#### **§ 719.2 What are the definitions of terms used in this part?**

For purposes of this part:

Alternative dispute resolution includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

Contractor means any person or entity with whom the Department contracts for the acquisition of goods or services.

Covered contracts means those contracts described in § 719.3 of this part.

Days means calendar days.

Department means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

Department Counsel means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part.

General Counsel means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

Legal costs means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided

by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

Legal Management Plan means a document required by subpart B of this part describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

Litigation means a proceeding arising under or related to a contract between the contractor and the Department to which the contractor is a party in a State, tribal, territorial, foreign, or federal court or before an administrative body or an arbitrator.

Retained legal counsel means a licensed attorney working in the private sector who is retained by a contractor or the Department to provide legal services.

Retrospective insurance means any insurance policy under which the premium is not fixed but is subject to adjustments to reimburse the insurance carrier for actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs). Retrospective insurance includes service-type insurance policies as described in 48 CFR 928.370.

Settlement agreement means a written agreement between a contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

Significant matters means legal matters involving significant issues as determined by Department Counsel and identified to a contractor in writing, and any legal matters where the amount of any legal costs, over the life of the matter, is expected to exceed \$100,000.



Staffing and Resource Plan means a statement prepared in accordance with subpart B of this part by retained legal counsel that describes the method for managing a Significant Matter in litigation.

**§ 719.3 What contracts are covered by this part?**

(a) Unless excluded under § 719.5, this part covers the following three categories of contracts:

- (1) All management and operating contracts;
- (2) Non-management and operating cost reimbursement contracts exceeding \$100,000,000; and
- (3) Non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000).

(b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.

(c) This part also covers any contract the Department awards directly to retained legal counsel exceeding \$100,000.

**§ 719.4 Are law firms that are retained by contract by the Department covered by this part?**

Legal counsel retained under fixed rate or other type of contract or other agreement by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected by the

Department to exceed \$100,000 and retained legal counsel are so notified by the Department:

- (a) Requirements related to Staffing and Resource Plans in subpart B of this part;
- (b) Cost guidelines in subpart E of this part; and
- (c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at \$25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide \$26,000 in discovery-related legal work).

**§ 719.5 What contracts are not covered by this part?**

This part does not cover any contract under which the Department is not responsible for directly reimbursing the contractor for legal costs, such as fixed price contracts.

**§ 719.6 Are there any types of legal matters not included in the coverage of this part?**

Legal matters not covered by this part include:

- (a) Matters handled by counsel retained by an insurance carrier, except under retrospective insurance in accordance with § 719.45;
- (b) Routine intellectual property law support services; and
- (c) Routine workers and unemployment compensation matters.

**§ 719.7 Is there a procedure for exceptions or deviations from this part?**

- (a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor. The General Counsel or his/her

delegee shall provide a written response to such requests; however the response shall not require a justification of the Department's exercise of its discretion.

(b) The General Counsel may authorize exceptions or deviations requested under paragraph (a) of this section. The General Counsel may also establish exceptions to this part based on current field office and contractor practices that satisfy the purpose of these requirements.

(c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved in accordance with applicable DOE procurement policy. See, e.g., DOE Acquisition Guide chapter 1.1, requiring approval by the Senior Procurement Executive of DOE or NNSA as applicable. In any event, the written request from a contractor for a deviation from a cost principle relating to this part must be submitted to the contracting officer, with a copy provided to Department Counsel.

**§ 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?**

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is primarily rooted in the fact that the Department reimburses contractors for allowable costs incurred when litigation is threatened or initiated against contractors. However, other sources of the common interest between the Department and its contractors may include, but are not limited to, an interest in completion of the agency's important mission work and an interest in safe and efficient operation of the

Department's facilities. To the extent documents associated with compliance with this part (e.g., Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

#### **Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

##### **§ 719.10. Who must submit a Legal Management Plan?**

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

##### **§ 719.11 When must a Legal Management Plan be submitted or revised?**

(a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by Department Counsel.

(b) Contractors must submit a revised Legal Management Plan upon request of Department Counsel within 60 days of receipt of the Department Counsel's request. The request for a revised Legal Management Plan shall include an explanation of the request. The deadline for submitting the Legal Management Plan may be extended by the Department Counsel.

##### **§ 719.12 What information must be included in the Legal Management Plan?**

The Legal Management Plan must include the following items:

(a) A description of the contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and an explanation of the types of matters expected to be handled in-house.

(b) A description of the legal matters that may necessitate engagement of retained legal counsel.

(c) A description of the factors the contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(d) An outline of the factors the contractor must consider in selecting retained legal counsel, including:

(1) Cost;

(2) Past performance of previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) The location where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).

(e) A description of the system that the contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.

(f) A description of the role of in-house counsel in cost management.

(g) A description of the contractor's process for review and approval of invoices for legal costs.

(h) A description of the contractor's strategy for interaction with, and supervision of, retained legal counsel.

(i) A description of the procedures the contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;

(j) A description of the contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

#### **§ 719.13 Who at the Department receives and reviews the Legal Management Plan?**

Contractors must submit a Legal Management Plan to Department Counsel. If the contractor has not been notified of the assignment of Department Counsel, the contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

#### **§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?**

The Contracting Officer or Department Counsel will notify the contractor of any non-compliance or inadequate information relating to requirements in § 719.12 within 30 days

of the contractor's submission of the plan. The contractor must either correct matters identified within 30 days of notification or file a letter with the General Counsel disputing the determination of a deficiency.

**§ 719.15 What are the requirements for a Staffing and Resource Plan?**

(a) For significant matters in litigation, the contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The contractor must then forward the Staffing and Resource Plan to Department Counsel.

(b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.

(c) A Staffing and Resource Plan must describe the following:

- (1) Major phases likely to be involved in the handling of the matter;
- (2) Timing and sequence of such phases;
- (3) Projected cost for each phase of the representation; and
- (4) Detailed description of resources that the retained legal counsel intends to devote to the representation.

(d) A Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:

- (1) Matter assessment, development and administration;
- (2) Pretrial pleadings and motions;
- (3) Discovery;
- (4) Trial preparation and trial; and
- (5) Appeal.

(e) The contractor must notify Department Counsel before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (d) of this section.

**§ 719.16 When must the Staffing and Resource Plan be submitted?**

(a) The contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed \$100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner. The deadline for submitting the Staffing and Resource Plan may be extended by Department Counsel.

(b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a Staffing and Resource Plan. When an objection is stated, the contractor or retained legal counsel must either revise the Staffing and Resource Plan to satisfy the objection within 30 days or file a letter with the General Counsel disputing the objection.

(c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

**§ 719.17 Are there any budgetary requirements?**



(a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.

(b) The annual legal budget must include cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the contractor and Department Counsel, the contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the contractor.

#### **Subpart C—Engagement Letter**

##### **§ 719.20 When must an engagement letter be submitted to Department Counsel?**

Contractors must submit a copy of an executed engagement letter between it and retained legal counsel to Department Counsel when the retained counsel is expected to provide \$25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

##### **§ 719.21 What are the required elements of an engagement letter?**

(a) The engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a contractor representative including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.

(3) A requirement that the contractor, the Department, and the Government Accountability Office have the right, upon request, and at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.

(4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.

(5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(6) An initial assessment of the matter by retained legal counsel, along with a commitment to provide updates as necessary.

(7) A description of billing procedures, including frequency of billing and billing statement format.

(8) A statement setting forth an agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.

(9) A statement setting forth an agreement to consider alternative dispute resolution at the earliest possible stage and thereafter as appropriate where litigation is involved.

(10) A statement setting forth an agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.

(11) A statement setting forth an agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: “Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy’s regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are appropriate and related to the representation of the client.” The certification must be signed and dated by a representative of the retained legal counsel. Invoices must contain all elements (e.g., date of service, description of service, name of attorney, etc.) set forth in the model bill format in Appendix A to this part.

(12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.

(c) There may be additional requirements for an engagement letter based on the needs of the contractor or the Departmental element requiring the services of the Department retained legal counsel.

**Subpart D—Requests from Contractor Counsel to Initiate, Defend, and Settle Legal Matters**

**§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?**

(a) The contractor must provide written notice to Department Counsel prior to initiating litigation or appealing from adverse decisions.

(b) The contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department Counsel.

(c) The following information must be provided to Department Counsel by the contractor prior to initiating litigation or appealing an adverse decision:

- (1) Identification of the proposed parties;
- (2) The nature of the proposed action;
- (3) Relief sought;
- (4) Venue;
- (5) Proposed representation and reason for selection;
- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and
- (10) A discussion regarding why initiating litigation would prove beneficial to the contractor and to the Department.

**§ 719.31 When must the contractor initiate litigation against third parties?**

The contractor must initiate litigation, upon the request of the contracting officer, against third parties including proceedings before administrative agencies, in connection with the contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

**§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?**

(a) The contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency and any claim which will be handled by a retrospective insurance carrier if costs (including Legal costs, settlements, claims paid, damages, etc.) are likely to be \$100,000 or more, filed against the contractor arising out of the performance of the contract and shall provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the contractor as to:

- (1) Whether the contractor must authorize the Government to defend the action;
- (2) Whether the Government will take charge of the action; or
- (3) Whether the Government must receive an assignment of the contractor's rights.

(b) The contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the legal proceeding against the contractor are potentially allowable under the contract, the contractor shall:

(1) Authorize Department representatives to collaborate with contractor in-house counsel or Department Counsel-approved outside counsel in settling or defending the legal proceeding; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and

(2) Authorize Department representatives to settle the legal proceeding or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

**§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?**

The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of \$25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the legal costs incurred in connection with the underlying legal matter will be determined to be allowable.

**§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?**

The contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

- (a) The amount of any proposed monetary settlement payment.
- (b) Titles and docket numbers associated with the case(s) for which the contractor is seeking approval to settle;

- (c) The procedural history of the case(s) or issue(s);
- (d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;
- (e) A description of the history of the settlement discussions;
- (f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the contractor entering into the proposed agreement;
- (g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;
- (h) A description as to why settlement of the matter is in the best interest of the Department; and
- (i) Any additional supporting documents requested by Department Counsel.

**§ 719.35 When must the contractor provide a copy of an executed settlement agreement?**

A contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

**Subpart E—Reimbursement of Costs Subject to this Part**

**§ 719.40 What effect do the regulations of this part have on cost allowability?**

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that

legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.

**§ 719.41 How does the Department determine whether fees are reasonable?**

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider among other things:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services, at appropriate competency and experience levels, were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and

(d) The complexity of the legal matter and the expertise of the law firm in this area.

**§ 719.42 What categories of costs are unallowable?**

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304.

(b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(c) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

**§ 719.43 What is the treatment of travel costs?**



(a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

(b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation, e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

**§ 719.44 What categories of costs require advance approval?**

(a) To be considered for reimbursement, costs incurred by retained legal counsel for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the contractor's control make advance approval unobtainable:

(1) Computers or general application software, or non-routine computerized databases, if they are specifically created for a particular matter. For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and

cost-effective. Use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered. Contractors and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

(2) Secretarial and support services, word processing, or temporary support personnel;

(3) Attendance by more than one attorney at a deposition, court hearing or interview;

(4) Expert witnesses and consultants;

(5) Trade publications, books, treatises, background materials, and other similar documents;

(6) Professional or educational seminars and conferences;

(7) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;

(8) Food and beverages when the attorney or consultant is not on travel status and away from the home office;

(9) Pro hac vice admissions; and

(10) Time charged for law students' or interns' services.

(b) Requests for fee increases by retained legal counsel, other than those under contract directly with the Department, must be sent in writing to the contractor, who will review the request for reasonableness. If the contractor determines the request is reasonable, the contractor must seek approval for the increase from Department Counsel

before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

**§ 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?**

(a) The contractor shall establish a monitoring system for significant matters in litigation which are handled by subcontractors other than retrospective insurance carriers whose contracts provide for the reimbursement of legal costs. The purpose of this monitoring system is to enable the contractor to be regularly informed of the progress of the Significant Matter, to monitor the associated costs and help ensure that they are reasonable, and to report on the progress of the Significant Matter and the associated costs to Department Counsel.

(b) The contractor shall require retrospective insurance carriers and other subcontractors whose contracts provide for the reimbursement of legal costs to request prior permission from the contractor to enter into a settlement agreement with, or make any payments to, claimants or third-parties if:

(1) In the case of a subcontractor other than a retrospective insurance carrier, the settlement or payment amount is likely to reach \$25,000 or more; or

(2) In the case of a retrospective insurance carrier, the settlement or payment amount is likely to reach \$100,000 or more.

(c) The contractor shall require the insurance carrier or other subcontractor to submit all documentation described in § 719.34 and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the contractor will promptly forward to Department Counsel. The contractor shall not authorize the

subcontractor to enter into a settlement agreement or make a payment to a claimant or third-party that is likely to reach or exceed the above-stated threshold amounts without first obtaining the approval of the Department Counsel.

(d) Upon request from Department Counsel, the Contracting Officer, or other authorized representative of the Department, the contractor shall provide detailed cost information regarding particular legal matters handled by retrospective insurance carriers or other subcontractors whose contracts provide for the reimbursement of legal costs.

(e) The contractor shall provide reviewed costs and status updates for all significant matters in litigation handled by subcontractors whose contracts provide for the reimbursement of legal costs in accordance with § 719.51. The contractor is not required to provide cost and status updates for matters handled by retrospective insurance carriers except upon the written request of the cognizant Contracting Officer or Department Counsel.

**§ 719.46 Are costs covered by this part subject to audit?**

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. *See* § 719.21.

**§ 719.47 What happens when more than one contractor is a party to a matter?**

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the

particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor demonstrates that it was reasonable for the contractor to incur such expenses.

#### **Subpart F—Department Counsel**

##### **§ 719.50 What authority does Department Counsel have?**

(a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.

(b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602–1, and contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and authority of a contracting officer's representative.

##### **§ 719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?**

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but

not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

**§ 719.52 What types of field actions must be coordinated with the General Counsel?**

(a) Requests from contractors for exceptions or deviations from this part must be submitted to the contracting officer and Department Counsel, and approved by the General Counsel or his/her delegee.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her delegee.

(c) Department Counsel must inform the General Counsel of any Significant Matter, as defined in this part, and must coordinate any action involving a Significant Matter with the General Counsel, or his/her delegee, as directed by the General Counsel or his/her delegee.

**Appendix A to Part 719—Guidance for Legal Resource Management**

**Management and Administration of Outside Legal Services**

**1.0 Alternative Dispute Resolution**

**2.0 Cost Allowability Issues**

**2.1 Underlying Cause for Incurrence of Costs**

**Attachment—Contractor Litigation and Legal Costs, Model Bill Format**

*Management and Administration of Outside Legal Services*

This guidance is intended to assist contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

### *1.0 Alternative Dispute Resolution*

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during pre-discovery, after initial discovery and during pretrial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

### *2.0 Cost Allowability Issues*

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201–3 establishes that no presumption of reasonableness is attached to the incurrence of costs by a contractor.

#### *2.1 Underlying Cause for Incurrence of Costs*

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability,

fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

**Attachment—Contractor Litigation and Legal Costs, Model Bill Format**

*1. Model Bill Format*

I—For Fees

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
(See Note 1 to this table).					

II—For Disbursements

Date	Description of disbursement	Amount
(See Note 2 to this table).		

**Note 1—Description of Service:** All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

**Note 2—Description of Disbursement:** Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable



Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times the price per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (e.g., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

**Note 3—Receipts:** Receipts for all expenses equal to or above \$75 must be attached.

## **TITLE 48—FEDERAL ACQUISITION REGULATIONS SYSTEM**

### **Chapter 9 – Department of Energy**

#### **PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES**

2. The authority citation for part 931 continues to read as follows:

**Authority:** 42 U.S.C. 7101, et seq.; 50 U.S.C. 2401, et seq.

3. Section 931.205-19 is revised to read as follows:

##### **931.205-19 Insurance and indemnification.**

(f) The contracting officer shall insert the clause at 952.231-71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228-7, in

(1) Non-management and operating cost reimbursement contracts exceeding \$100,000,000, and

(2) Non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000 (e.g. contracts with both fixed-price and

cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000.

4. Section 931.205-33 is revised to read as follows:

**931.205-33 Professional and consultant service costs.**

(g) If the clause at 48 CFR 952.231-71 or the clause at 48 CFR 970.5228-1 is included in the contract, or the contract is a non-management and operating contract exceeding \$100,000,000 that includes cost reimbursable elements exceeding \$10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

**PART 952— SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. The authority citation for part 952 continues to read as follows:

**Authority:** 42 U.S.C. 7101 et seq. and 50 U.S.C. 2401 et seq.

6. Section 952.231-71 is revised to read as follows:

**952.231-71 Insurance-litigation and claims.**

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

**Insurance--Litigation and Claims (INSERT MONTH AND YEAR 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER)**

(a) The contractor must comply with 10 CFR part 719, contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed--

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or limitation of funds clause of this contract.

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f) (1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgment and settlements--

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's--

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person

would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term “contractor’s managerial personnel” is defined in the Property clause in this contract.

(g) (1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

## **PART 970 – DOE MANAGEMENT AND OPERATING CONTRACTS**

7. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 et seq.; 50 U.S.C. 2401, et seq.

8. Section 970.2803-2 is revised to read as follows:

**970.2803-2 Contract clause.**

The contracting officer shall insert the clause at 970.5228-1, Insurance--Litigation and Claims, instead of the clause at 48 CFR 52.228-7, in all management and operating contracts. Paragraphs (f)(3)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

9. Section 970.5228-1 is revised to read as follows:

**970.5228-1 Insurance--litigation and claims.**

As prescribed in 970.2803-2, insert the following clause:

**Insurance--Litigation and Claims ([INSERT MONTH AND YEAR 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])**

(a) The contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of

this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed--

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the clause of this contract entitled "Obligation of Funds."

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f) (1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgments and settlements--

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's--

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term "contractor's managerial personnel" is defined in the Property clause in this contract.

(g) (1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.



(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

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